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Supreme Court of the United States.

October Term, 1904.

WALTER S. McMICHAEL, et al.,
Plaintiffs in Error and Appellants,

vs.

SAMUEL MURPHY, et al.

No. 166.

In Error to and Appeal from the Supreme Court of the Territory of Oklahoma.

Brief for Plaintiffs in Error and Appellants.

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PRESS OF BYRON S. ADAMS.

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STATEMENT OF THE CASE.

This is a writ of error to and appeal from the Supreme Court of the Territory of Oklahoma to review the judgment (pp. 61, 62-68) whereby it affirmed the judgment of the District Court of Oklahoma county (p. 56), sustaining the demurrer to the petition of William T. McMichael, and dismissed his suit.

On September 12, 1901, McMichael filed his petition in the district court, praying that the defendant Murphy be declared to have taken legal title to a certain piece of land in trust for him; that a patent for the land issued to Murphy by the United States be declared null and void and be canceled; that the defendants Batchelder, White, Classen, Beebe, Mitcher, Overholser, The Armstrong Mercantile Company, Land and Lee—Murphy's grantees—be declared to have taken title, subject to the equities, and charged with the trust in favor of McMichael; that all of

these defendants be required to convey to McMichael the portions of the said land to which they held the legal title; that the defendant O'Brien as sheriff of Oklahoma county be restrained from executing certain writs of possession then in his hands for execution and which had been issued by the said district court in actions brought against McMichael by Murphy and White whereby they sought to secure possession of the said land; and that McMichael have any further relief, to which he might be entitled, in the premises (pp. 44-45).

In substance the facts set forth in the petition are these (pp. 25-45):

The land in dispute contains 160 acres, is of the value of more than $20,000, and is described as the southwest quarter of section 7, township 12, north of range 3, West Indian meridian (pp. 26, 44). On April 23, 1889, the defendant Ewers White filed a homestead entry in the local land office at Guthrie, Oklahoma, whereby he undertook to acquire the land (p. 26). On April 24, 1889, one Charley J. Blanchard in the like manner attempted to enter the said land. His application was rejected because of White's entry. On April 27, 1889, he filed an affidavit of contest, charging that White had entered upon and occupied land in the Territory of Oklahoma before such lands were opened for settlement, to-wit, before April 22, 1889, and was disqualified from ever entering or acquiring any such lands by the act of Congress approved March 2, 1889 (25 Stat. F., 980, 1004-1006), and the proclamation of the President (26 Stat. F., 1544) issued pursuant to that act on March 23, 1889 (p. 26). On May 1, 1889, one Vestal S. Cook in like manner made application to enter said land. It was rejected because of White's entry and Blanchard's affidavit of contest. Cook thereupon filed an

affidavit of contest attacking White's entry and Blanchard's contest (p. 26). On July 16, 1889, the contest between White, Blanchard and Cook came on to be heard in the local land office, which on July 19th recommended that White's entry be canceled and the contests of Blanchard and Cook dismissed (p. 27). From this decision the three parties took appeals to the Commissioner of the General Land Office. On March 7, 1890, the Commissioner affirmed the decision of the local office. Further appeals were taken to the Secretary of the Interior (p. 27). On November 28, 1890, while the appeals last mentioned were pending, White relinquished his entry (pp. 29-30). On July 21, 1891, the Secretary affirmed the decision of the Commissioner in so far as it related to the contests of Blanchard and Cook (pp. 31-36; see 13 L. D., 68).

In the mean time McMichael had on May 28, 1889, settled upon the said land peaceably and without force, finding it unenclosed. He was qualified to enter and acquire it as a homestead, and it was his intention to do so. He took with him his wife, family and all of his possessions (p. 26). On July 21, 1889, after the rendition of the decision of the local land office, holding that White, Blanchard and Cook were all disqualified from entering or acquiring the land, McMichael made application to enter it, showing that he had settled upon it, and had in all respects complied with the homestead laws. His application was rejected because of White's entry (p. 27). On August 2, 1889, while plaintiff was in peaceable possession of the land, White entered into a conspiracy with one D. F. Stiles, an officer of the United States Army, then acting as provost marshal at Oklahoma City, for the purpose of cheating and defrauding McMichael and depriving him of the rights which he had acquired by settlement. On the same day, in consequence of

this conspiracy, a body of armed soldiers, acting under the command of Stiles, forcibly and wrongfully ejected McMichael and his family, and White then and thereafter publicly threatened to do McMichael bodily harm if he attempted to return to the land (p. 28). On August 31, 1889, McMichael again made application to enter the land, and tendered the fees therefor prescribed by law. This time his application was *received* by the local land office and marked *suspended pending final action in the contest between White, Blanchard and Cook* (p. 27). At the same time McMichael filed an affidavit of contest, charging that White, Blanchard and Cook had all of them entered the Territory prior to April 22, 1889, and contrary to the law (*supra*), and for that reason were disqualified from acquiring the said land or any other land in the territory. The affidavit related the facts concerning McMichael's settlement upon the land and his application to enter the same and tendered proofs of the facts charged (pp. 27-28). McMichael was given no opportunity to prosecute that contest, although he stood ready to do so.

By reason of his forcible ejectment from the land on August 2, 1889, and by reason of the threats then and thereafter made by the defendant White, McMichael was deprived of the possession of part of the land until November 30, 1890, though he continued to occupy and cultivate a part of it and make claim to the whole of it as a homestead to which he was entitled by virtue of the priority of his settlement and his contest against the pretensions of White, Blanchard and Cook (p. 29). About January 1, 1890, he procured building materials and commenced the construction of a dwelling upon the land. In his temporary absence White, unlawfully and wrongfully burned and destroyed the unfinished building and the materials provided for its

completion, and threatened, openly, to kill McMichael if he should again venture upon the land. Nevertheless, he continued to occupy the land and cultivate and improve it up to the commencement of this suit (p. 29).

Between August 31, 1889, and November 28, 1890, White, realizing that he could not acquire a patent for the land, offered to relinquish his entry if McMichael would pay him $1,000. McMichael refused. White thereupon declared that he could and would find people to acquire title for him, and that McMichael should never acquire any part of the land. Believing that McMichael would prevail in his contest filed August 31, 1889, White entered into a conspiracy with the defendant Murphy for the purpose of defrauding McMichael. Although the contest between White, Blanchard and Cook was still pending before the Secretary of the Interior, White relinquished his entry on November 29, 1890, it being agreed between him and Murphy that simultaneously with the filing of his relinquishment Murphy should enter the land, and that by fraud and purjury he should procure a patent for it, and then convey a large part of it to White (pp. 29-30). In this conspiracy White and Murphy met with success. No sooner had White filed his relinquishment than Murphy filed an application to enter the land. This the local office accepted, immediately, notwithstanding the fact that the officials well knew about the McMichael's settlement, and his application and contest of August 31, 1889, were then on file in their office, marked suspended, pending final action in the case of White, Blanchard and Cook; notwithstanding the fact that the contests of Blanchard and Cook had not been finally passed upon by the Secretary of the Interior, and notwithstanding the fact that there were three other applications then in existence, two of them for homestead entries, accom-

panied by contests, and the third, a soldier's declaratory statement (pp. 28, 30).

Having resumed possession of the whole of the land, on November 30, 1890, or immediately after White's relinquishment, McMichael, on December 4, 1890, made a third application to enter it, tendering the requisite fees. It was rejected because of Murphy's entry. Thereupon McMichael appealed to the Commissioner of the General Land Office, showing that the acceptance of Murphy's entry was wrongful, and an invasion of his preferential rights, acquired by settlement, and contest. Finally the case came on for determination by the Secretary of the Interior, who considered the claims of McMichael, Murphy and several other persons, including one Holt, who had filed a soldier's declaratory statement. The Secretary held (20 L. D., 147) that plaintiff did not acquire any rights by his settlement or his applications, and that his contest against White, Blanchard and Cook was not a contest in a technical sense; also that Murphy's entry was, improperly, received by the local office, because Holt's application was pending on November 29, 1890, and was entitled to priority (pp. 31-36). McMichael in his petition charged that this decision was erroneous in so far as it related to him, and that the Secretary's conclusions were founded upon misconstructions and misapplications of the law (pp. 40-43). Notwithstanding that the Secretary had decided that Holt was entitled to the land, Murphy continued to claim it under his entry, while Holt remained inactive until June 16, 1897. Meanwhile McMichael had filed and proved a contest against Holt, which the local land office had not decided. On June 16, 1897, Murphy made alleged final proofs for the purpose of securing a patent, and at the same time, Holt formally relinquished his rights.

These things were the result of a conspiracy entered into by Murphy and Holt to defraud McMichael and avoid his contest against Holt (pp. 36-37). Murphy had published the fact that on May 10, 1897, he would appear at the local land office and submit his final proofs. On that day McMichael appeared at the office with witnesses, prepared to prove that Murphy had failed to comply with the homestead laws. Murphy failed to appear. McMichael notified the officials of the land office that he was prepared to show that Murphy was not entitled to receive a patent for the land, and wished to be heard when the latter should attempt to offer his final proofs. The officials promised to give him notice of the date set for the hearing. Thereafter without advertisement or publication of any kind, and without any notice, the officials, covertly and by stealth, on June 16, 1897, heard and accepted Murphy's proofs, although they knew them to be false, in that Murphy had not made any improvements upon the land in dispute, as he and his witnesses falsely testified (p. 37). Thereafter the defendant Classen, who was the receiver of the local office, admitted to McMichael that he had not fulfilled his promise to notify the latter of the hearing, because he was a friend of Murphy's. The petition charges that Classen and Murphy had entered into a conspiracy to cheat and defraud McMichael, and that the several acts and omissions of the two in connection with Murphy's final proofs were part and parcel of this conspiracy.

On July 27, 1897, before he had received a patent for the land, Murphy fraudulently conveyed a part thereof, containing 120 acres, to the defendant Batchelder without consideration. This conveyance was part and parcel of the fraudulent scheme whereby White, Murphy and their associates were endeavoring to secure title to the land

and thus to defraud McMichael (p. 38). On January 24, 1898, the day on which Murphy received his patent, he conveyed the same 120 acres to White without consideration as his agreed share of the usufruct of their unlawful and fraudulent transactions above described (p. 38). On May 13, 1899, White conveyed to the defendant Classen, without consideration, the same 120 acres. This, like the conveyance to Batchelder, was made with fraudulent intent (p. 38).

Each one of the defendants, Batchelder, White, Classen, Beebe, Mitcher, Overholser, The Armstrong Mercantile Company, Land and Lee, claimed to own or have an interest in a part of the said land, having acquired the same, directly or indirectly, from Murphy. The petition charged that each of them took title with full knowledge of and subject to McMichael's rights, all of them having been parties to or cognizant of the fraudulent transactions whereby Murphy secured his patent (p. 43).

It is further charged that by reason of the several conspiracies, frauds, perjuries and other unlawful transactions described, McMichael was prevented from acquiring title to the land, by patent from the United States. Also that by reason of the erroneous decisions of the officials of the Land Department and the Secretary of the Interior his preferential rights as settler, entryman, and contestant were denied him, and he was unlawfully deprived thereof (pp. 40-44).

Shortly before the present suit was brought Murphy and White, having brought actions at law against McMichael in the district court seeking to secure possession of certain parts of the land in dispute, obtained judgments. When the petition was filed writs of possession issued pursuant to those judgments were in the hands of the defendant O'Brien, sheriff of Oklahoma county, for execution. McMichael

charged that by reason of his rights, acquired in the manner above described, the execution of those writs would do him wrong and injustice, and asked that execution thereof be restrained (p. 43). After McMichael filed his petition the defendants moved the court to require him to attach thereto the petitions and judgments in the said actions brought against him by White and Murphy (p. 54). This motion was granted. McMichael noted an exception and complied with the court's order (pp. 45-53).

Defendants next filed a demurrer to the petition assigning as grounds thereof (1) that the cause was *res adjudicata* by reason of the judgments in favor of White and Murphy, and (2) that the petition failed to state facts sufficient to constitute a cause of action against the defendants or any of them (p. 55). On plaintiff's motion the court struck out the first ground of the demurrer. No exception was noted by defendants. After hearing, the court sustained the demurrer upon the second ground. Plaintiff elected to stand on his petition, judgment was entered dismissing the case, and he took an appeal to the Supreme Court of Oklahoma. While this appeal was pending McMichael died and the suit was revived in the names of his heirs, the present plaintiffs in error and appellants (p. 56). The Supreme Court of the territory affirmed the judgment of this district court, whereupon the cause was brought up to this court in the manner heretofore described.

SPECIFICATIONS OF ERROR.

The errors of the Supreme Court of the Territory of Oklahoma assigned by the plaintiff in error and appellants and intended to be urged are these:

1. The said court erred in holding that the plaintiff, William T. McMichael, did not, by his settlement upon and improvement of the land in dispute, acquire rights in the same which gave his several applications to enter the same as a homestead, priority over the applications of the defendant Murphy (p. 20, Assignments: second, seventh and eleventh).

2. The said court erred in holding that the application of the plaintiff, William T. McMichael, to enter the land in dispute, as a homestead and his affidavit of contest filed August 31, 1889, did not give him preferential rights as against the defendant Murphy (p. 20, Assignments: second, sixth and seventh).

3. The said court erred in holding that the defendant Murphy and other defendants, his grantees, were entitled to the land in dispute, notwithstanding the fact that they acquired their legal title thereto by means of frauds, conspiracies, perjury, and other unlawful transactions, to which all of them were either parties or privies, by reason whereof the plaintiff McMichael was unlawfully prevented from securing the legal title to the same (pp. 20-21, Assignments: sixth, seventh, ninth, tenth and eleventh).

4. The said court erred in affirming the judgment of the District Court of Oklahoma county whereby it sustained the demurrer to the petition and dismissed plaintiff's suit (pp. 20-21, Assignments: sixth, seventh, ninth, tenth and eleventh).

ARGUMENT.

I.

By his settlement and residence upon the land in dispute the plaintiff McMichael acquired preferential rights therein, and his applications to enter the said land were entitled to priority over the application of the defendant Murphy.

On May 28, 1889, when the plaintiff McMichael settled upon the land in dispute, intending to acquire it under the homestead laws, it was unenclosed. His settlement thereon occurred without resistance or objection. Hence his presence upon the land was not unlawful, and was one which might give rise to preferential rights in his favor, provided, of course, that the pending claims of White, Blanchard and Cook were rejected. (*Marks* v. *Bray*, 1 L. D., 434; *Banks* v. *Smith*, 2 L. D., 44; *Ward* v. *Gann*, *Id.*, 630; Meiszner's Case, 8 L. D., 237.)

When he made his settlement McMichael knew that the contest between the persons named was pending in the local land office, and while he believed that none of them was qualified to acquire the land, he made no attempt to enter it until July 21, 1889, when that contest had been heard and decided. Nevertheless, with the full intention of securing the land, he had established himself upon it, taking with him his family and all of his belongings. By the decision rendered on July 19, 1889, White's entry was held for cancellation and the contests of Blanchard and Cook were dismissed, it appearing that each one of them had resided in the territory of Oklahoma before lands therein were opened for settlement in violation of the act of March 1, 1889 (*25 Stat. L., 757, 759*), and of the explicit and em-

phatic prohibition of the proclamation of the President, issued March 23, 1889 (26 *Stat. L.*, *1544*, *1545*), and therefore all of them were, for all time, disqualified from entering or acquiring any lands in the territory. Believing that the effect of this decision was to restore the land to the public domain and render it free for entry, McMichael, on July 21, 1889, made his first application for a homestead entry. This application was rejected, yet believing that his settlement entitled him to secure the land for a home, McMichael continued to reside thereon. It was not until August 2, 1889, that he met with any opposition or objection. On that day he was forcibly ejected by military authority. The armed force that dispossessed him acted under the command of one Stiles, a captain in the United States Army, who had entered into a conspiracy with the defendant White to oust McMichael, interrupt his residence and ultimately defraud him of his rights gained by priority of settlement. The court below erred in saying (p. 68) that it would assume that Stiles acted properly and in accordance with law. We have, in the petition, which, for purposes of this hearing, is our sole source of information as to the facts, the charge, explicitly made, that the intervention of Stiles was the result of an unlawful conspiracy, entered into by him and the defendant White, for the purpose of defrauding McMichael. From the decision of the local land office White had taken an appeal to the Commissioner. He knew that by express provision of the statute and proclamation, he was disqualified from entering the land and could not acquire it; but had not given up the hope of getting the greater part of it, indirectly and by means of fraud. He required time to develop and perfect his plans and secure confederates. In the meantime he did not wish McMichael's settlement to ripen into a preferential right, which would

supersede the claim of the puppet, whom he would choose to enter the land and procure a patent for his benefit.

The Secretary of the Interior held erroneously (*20 L. D., 147*) that McMichael's residence was not continuous, and that he was not, in contemplation of law, a settler upon the land between August 2, 1889, and November 30, 1890, and was not entitled to the preference accorded to settlers when on November 29, 1890, White's relinquishment was filed. In spite of his forcible ejectment McMichael never relinquished the actual possession of part of the land, and never ceased to claim that he was entitled to acquire the whole of it as a homestead. Under these circumstances he was, in contemplation of law, in possession of and a settler upon the land from May 28, 1889, continuously throughout the period covered by the transactions described in his petition. His temporary absence from part of the land, wrongfully compelled by military force and induced by intimidation, did not break the continuity of his residence. If McMichael had, in fact, been absent from the land at the time of White's relinquishment and Murphy's entry, he would nevertheless have been entitled to priority over Murphy by virtue of his settlement and residence. (*Dorgan* v. *Pitt*, 6 L. D., 616; *Pfister* v. *Boyer*, 19 L. D., 178; *Arnold* v. *Cooly*, 10 L. D., 551; *Smith* v. *Place*, 13 L. D., 214; *Reedhead* v. *Hauenstine*, 15 L. D., 554; *Kinman* v. *Appleby*, 32 L. D., 526.)

McMichael not only resided upon the land continuously, but insofar as he could, notwithstanding the lawless acts of White, he cultivated and improved it. No improvements of any consequence were made by anyone else.

There was no abandonment by McMichael of any rights that he had gained. On the contrary, on August 31, 1889, he made a second application to enter the land in dispute,

tendering the proper fees for the making of such an entry, and in other respects offering to comply with all requirements of the homestead laws. This entry was *received* by the local land office and marked: suspended, pending final action in the contest between White, Blanchard and Cook. Final action in that case, cancelling White's entry because of his disqualification, was only prevented by the relinquishment of his entry made on November 29, 1890.

Forthwith, upon the filing of White's relinquishment, the preferential rights acquired by McMichael through settlement and residence attached to the land. His application to enter it, which he had filed on August 31, 1889, and which had since remained in the local office awaiting only the removal of White's entry from the records, should at once have been accepted and entered. Again, McMichael's preferential rights extended to the filing of a new entry within thirty days from the filing of the relinquishment. (Act May 14, 1880, 21 Stat. L., 140.) He did file a new and his third application on December 4, 1890. That should have been received. Its rejection because of Murphy's entry, made contemporaneously with White's relinquishment, was wrong. Murphy made no pretence of being a settler, resident, contestant, or anything but a stranger so far as the land was concerned.

This court in recent opinions has reviewed the homestead laws, considering their purport and policy. Several of these deal with the rights of *bona fide* settlers as against those of mere entrymen, even such as Murphy. They show that McMichael gained the right to enter and acquire the land, and of that right was wrongfully deprived. (*Moss* v. *Dowman*, 176 U. S., 413; *Bohall* v. *Dilla*, 114 U. S., 47; *Quinby* v. *Conlan*, 104 U. S., 420; *Stone* v. *Cowles*, 14 L. D., 90; *Hunter* v. *Blodgett*, 20 L. D., 452; *Rickers* v. *Tisher*, 19 L. D., 421.)

II.

By his contest filed August 31, 1889, by which he attacked the entry of the defendant White and the claims of Blanchard, the plaintiff McMichael acquired preferential rights, and both his application to enter the land in dispute, made at that time and the one made by him on December 4, 1890, were entitled to priority over the application of the defendant Murphy.

It was provided by Section 2 of the Act of May 14, 1880 (*supra*):

> "In all cases where any person has contested, paid the land office fees, and procured the cancellation of any preemption, homestead or timber culture entry he shall be notified by the register of the land office of the district in which such land is situated of such cancellation, and shall be allowed thirty days from the date of which notice to enter said lands, provided that said register shall be entitled to a fee of one dollar for the giving of such notice, to be paid by the contestant, and not to be reported."

Along with his application to enter the land in dispute, filed on August 31, 1889, McMichael presented an affidavit, whereby he contested the validity of White's entry and the pretensions advanced by Cook and Blanchard. The law prescribes no particular form for contests challenging the validity of homestead entries. The Land Office Circular (1899, p. 301) gives a form for affidavits to be filed before contest, according to which a contestant need do no more than declare upon oath, that he is acquainted with the land embraced in the entry attacked; that he is prepared to prove at such time and place as the officials of the local land office may designate, facts, which will lead to the

cancellation and forfeiture of the entry, and that he will pay the cost of the hearing. McMichael's affidavit may have been prolix, but it contained all of the averments indicated by the department's form as essential to the institution of a contest. He could do no more than file the paper and tender the fee. It was for the register and receiver of the local office to designate a time for hearing. They never did so and never gave McMichael an opportunity to submit his proofs. Speaking of this contest the Secretary of the Interior said (*McMichael* v. *Murphy*, 20 L. D., 147):

> "The protest I have examined with care. It was filed not long after the local land office held White's entry for cancellation and refers to that fact. It sets forth the entire history of the tract from the opening of the territory down to the date said instrument was filed. It declares the entry of White to be void and the claims of Blanchard and Cook of no effect for reasons hereinbefore stated. It asserts that McMichael's claim to the land is paramount to all others by reason of his settlement as above set forth. It recites the ejectment of McMichael from said tract by the military at the instigation of said White, and that he is kept off said tract by White's threats and intimidation. After giving an account of McMichael's application to make homestead entry on July 19, 1889, it stated that affiant thereafter tendered his application and affidavit to enter said land, and now asks that when said entry of White be canceled that they be received and filed by the United States land office and a certificate be issued to him by the receiver. He then protests against any other person being permitted to enter said land, and requests that if such attempt is made, that a hearing as to affiant's rights be had, and that he be awarded the right to enter said land. Such is the instrument which McMichael claims caused White's relinquishment and entitled him to the preference right of entry as against Murphy. It is *an information, a declaration, a protest and a prayer.*"

Notwithstanding this admission that the affidavit recited all facts essential to the initiation of a contest, the Secretary held that it had not the legal effect of a contest. Clearly he erred in taking so narrow and technical a view of the matter.

If the present case, like that of *Hodges* v. *Colcord* (193 U. S., 192), involved the rights of two contestants, there would be occasion for an inquiry as to which of them actually procured the cancellation of the earlier entry. But here we have no issue of that kind. We have on the one hand McMichael, whose settlement and residence dated back for eighteen months prior to Murphy's application, and whose contest dated back for fifteen months prior thereto; and on the other hand Murphy, who was an absolute stranger. It must be remembered that when Murphy applied to enter the land, McMichael's contest was on file in the local land office, marked suspended, pending final action in the contest of White, Blanchard and Cook. It is true that on account of the non-action of the local land office, McMichael's contest had not been given a hearing. But McMichael charges that it was his contest which induced White to relinquish his entry. White's offer to do so if McMichael would pay him $1,000, is specific proof that such was the case. Under these circumstances there were but two things which the local land office could lawfully have done: (1) allowed McMichael a period of thirty days wherein to perfect his entry after giving him notice of White's relinquishment (Act of May 14, 1880, *supra*), or (2) awaited the Secretary's decision on the contests of Blanchard and Cook to see whether either of them would be sustained, and in that event have given McMichael a hearing upon his contest, and allow him, if successful, a period of thirty days to perfect his entry, after notice of the Secretary's

decision. The acceptance of Murphy's entry, contemporaneously with the filing of White's relinquishment amounted to a total disregard of the preferential rights which McMichael had acquired. (*McClung* v. *Penny*, 189 U. S., 143, 147.)

III.

The several frauds, conspiracies, perjuries and other unlawful transactions by which the defendant Murphy secured the legal title to the land in dispute and prevented the plaintiff, McMichael, from securing the same rendered Murphy's title void as against McMichael. All of the defendants, having been either parties to these unlawful transactions, or privy thereto, must be regarded as having taken, and as holding the legal title, as trustees for McMichael, and should be compelled to convey the said land to his heirs (plaintiffs in error and appellants).

It is unnecessary to recount the frauds, conspiracies and perjuries by which White and Murphy and their confederates, among whom were an official of the local land office and an officer of the United States Army, succeeded in procuring a patent for Murphy, and thereby defrauded McMichael. In the statement of the case we have described those transactions at length, and have shown that their ultimate effect was to secure from the United States, for White, the legal title to three-fourths of the land, although the statute and the proclamation of the President (*supra*) declared that such as he should never enter or acquire any lands in Oklahoma; also that the patent procured by fraud and perjury had been the means by which White and Mur-

phy had obtained judgments of ejectment against McMichael, and they were on the point of ousting him, although he, as the first qualified settler, and the first, if not the only honest applicant, contestant and resident, was justly entitled to the land.

Under these circumstances McMichael's remedy was by petition to a court of equity for the securing and protection of his rights, which were not cognizable by a court of law. He was entitled (1) to have it adjudged that Murphy and his grantees took title as trustees for him, (2) to a decree compelling the defendants to convey the land to him, and (3) to an injunction restraining the execution of the judgments of ejectment. (*Johnson* v. *Towsley*, 13 Wall., 72; *Moore* v. *Robbins*, 96 U. S., 513; *Warren* v. *Van Brunt*, 19 Wall., 646; *Re Emblen*, 161 U. S., 52; *Starke* v. *Storrs*, 6 Wall., 402; *Lytle* v. *Arkansas*, 22 How., 193; *Garland* v. *Wynne*, 20 How., 6; *Lindsey* v. *Hawes*, 2 Black, 554; *Brush* v. *Ware*, 15 Peters, 93; *Bodley* v. *Taylor*, 5 Cranch, 191; *Polk* v. *Wendell*, 5 Wheat., 293; *U. S.* v. *Maxwell*, 121 U. S., 325; *Sanford* v. *Sanford*, 139 U. S., 642.)

Frauds, such as those, specifically disclosed, by the petition, vitiate all transactions based thereon and destroy any asserted title to property, no matter in what form the evidence of such title may exist, even though the same be a patent issued by the United States. (*U. S.* v. *Steenerson*, 50 Fed. R., 507; *American Mortgage Co.* v. *Hoffer*, 64 Fed. R., 558.)

A patent procured by perjury such as that of the defendant Murphy when he falsely declared that he had resided upon and improved the land, and so complied with the homestead laws, is sufficient ground for the vacation and annulling of his patent, in the manner prayed by McMichael. (*U. S.* v. *Minor*, 114 U. S., 233.)

IV.

The demurrer to the petition should have been overruled by the District Court of Oklahoma County.

We have to deal with the defendants' second ground of demurrer alone. That is, to inquire whether the facts, set forth in McMichael's petition, constituted grounds for suit against the defendants, and whether upon proof of those facts the plaintiffs in error and appellants would be entitled to the relief prayed by the petition. In the preceding branches of this argument we have shown that the petition did recite facts amply sufficient for those purposes, and that the courts below erred in holding to the contrary.

The question raised by the defendant's first ground of demurrer is not before this court, but mention of it may be made by the defendant in error. They wished to set up the defense of *res adjudicata,* founded upon the judgments of ejectment obtained by White and Murphy against McMichael. To furnish foundation for that defense they asked for and obtained an order of the district court by which McMichael was required to attach to his petition transcripts of records in the actions at law brought against him by White and Murphy. McMichael noted an exception, but obeyed the order. Notwithstanding the fact that those records appear as exhibits attached to the petition, the defense of *res adjudicata* cannot be considered here. On plaintiff's motion defendant's first ground of demurrer was stricken out, and the defendants neither noted an objection nor did they take a cross appeal. The propriety of that ruling was not questioned in the court below. It cannot be questioned here. (*Morril* v. *Jones,* 106 U. S., 466, 467; *McLaughlin* v. *Bank,* 7 How'd., 220; *Fashnacht* v. *Frank,* 23 Wall., 416; *Bradstreet* v. *Potter,* 16 Pet., 317, 318.) Again, the defense of *res adjudicata* cannot be

raised by demurrer, but only by plea or answer. (*Statutes of Oklahoma*, 1893, Secs. 3967, 3969;* 9 *Am. & Enc. Pleading & Practice*, 611 *et seq.*) Again, the judgments obtained by White and Murphy do not furnish grounds for the defense of *res adjudicata*.

Each one of them was rendered in an action at law whereby White or Murphy sought to obtain possession of a portion of the land in dispute. In each case, properly enough, the District Court founded its judgment upon the patent from the United States which conferred upon Murphy and White, his grantee, the legal title to the land. In neither action was it competent for McMichael to set up, or for the court to consider, his equitable rights, which were, for the first time, drawn in question by the present suit. Hence the judgments did not deal with the subject matter of this controversy, and can have no effect upon it. (*2 Black on Judgments, 693; Apsden* v. *Nixon*, 4 How., 467.)

On examination of the records in the actions of *White* v. *McMichael* and *Murphy* v. *McMichael* it will be seen that the verdict in each was simply that the plaintiff was entitled to the possession of certain land. The judgments on these verdicts indicate that the court attempted to establish the plaintiff's title to the land. If so, the judgments are void, for a judgment cannot award remedies in excess of those called for by verdict. (*Statutes of Oklahoma*, 1893, Sec. 4300;* *Everett* v. *Aikens*, 8 Okla., 184; *Commissioners* v. *Moon*, I. D., 205; *Kidd* v. *Territory*, 9 Okla., 450.)

We submit that the judgment of the court below should be reversed.

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*See Appendix.

APPENDIX.

The Statutes of Oklahoma, 1893:

"(3967) Sec. 89. The defendant may demur to the petition only when it appears on its face, either: *First,* That the court has no jurisdiction of the person of the defendant, or the subject of the action. *Second,* That the plaintiff has no legal capacity to sue. *Third,* That there is another action pending between the same parties for the same cause. *Fourth,* That there is a defect of parties, plaintiff or defendant. *Fifth,* That several causes of action are improperly joined. *Sixth,* That the petition does not state facts sufficient to constitute a cause of action."

"(3969) Sec. 91. When any of the defects enumerated in section eighty-nine do not appear upon the face of the petition, the objection may be taken by answer; and if no objection be taken, either by demurrer or answer, the defendant shall be deemed to have waived the same, except only the objection to the jurisdiction of the court, and that the petition does not state facts sufficient to constitute a cause of action."

"(4300) Sec. 422. When a trial by jury has been had, judgment must be entered by the clerk in conformity to the verdict, unless it is special, or the court order the case to be reserved for future argument or consideration."